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Federal Rules of Civil Procedure--Use of Rule 23 Restricted

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CASE COMMENT

FEDERAL RULES OF CIVIL PROCEDURE—USE OF RULE 23 RESTRICTED

A diversity action was brought in federal district court by four property owners on behalf of themselves and some two hundred other similarly situated land owners and lessees bordering on Lake Champlain. The plaintiffs sought to maintain the suit as a class action under Rule 23(b)(3)¹ of the Federal Rules of Civil Procedure, alleging damages from the defendant, International Paper Company, for alleged pollution of the lake. The district court found that although each of the named representatives met the ten thousand dollar amount in controversy requirement of the diversity of citizenship jurisdictional statute,² many of the unnamed members of the class did not. The court, therefore, refused to allow the suit to proceed as a class action.³ The Court of Appeals for the Second Circuit affirmed,⁴ and the Supreme Court granted certiorari.⁵ Held, affirmed. Each and every individual plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount requirement. *Zahn v. International Paper Co.*, 94 S. Ct. 505 (1973).

The concept of the class action is not new. English equity practice originated the use of the class suit to make the administration of justice more convenient for the court and the parties and to avoid a multiplicity of suits where the rights and liabilities of many persons similarly situated could be fairly determined in one action.⁶ Justice Story, in the early case of *West v. Randall*,⁷ ac-

¹Fed. R. Civ. P. 23(b).

²The diversity of citizenship jurisdictional statute provides:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

- (1) citizens of different States;
- (2) citizens of a State, and foreign states or citizens or subjects thereof; and
- (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1332(a) (1970).

³*Zahn v. International Paper Co.*, 53 F.R.D. 430, 434 (D. Vt. 1971).

⁴469 F.2d 1033 (2d Cir. 1972).

⁵410 U.S. 925 (1973).

⁶3B J. MOORE, *FEDERAL PRACTICE* ¶ 23.02, at 23-71 (2d ed. 1969).

⁷29 F. Cas. 718 (No. 17,424) (C.C.R.I. 1820).

cepted the class action practice as sound procedure in this country. In the early part of this century, the class action was included as Rule 38 of the Equity Rules of Procedure: "When the question is one of common or general interest constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."⁸

When the Federal Rules of Civil Procedure were being drafted in 1938, a provision for class actions was included.⁹ The new federal rules expanded the availability of the class action by making the procedure available for both actions at law and bills in equity.¹⁰ In the former equity practice, the class action could be used only in cases of compulsory joinder;¹¹ however, the new Federal Rules added two other situations where the class action device could be used. The first, called the "hybrid" class action, involved the enforcement of rights which were several, when the object of the action was the adjudication of claims affecting specific property

⁸Equity R. 38, 226 U.S. 659 (1912).

⁹The 1938 Rule 23 provided as follows:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) Secondary Action by Shareholders.

* * *

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

¹⁰FED. R. CIV. P. 2. This Rule abolished all procedural distinctions between law and equity, which had the effect of making the class action procedure of Rule 23 apply to both law and equity.

¹¹*Commonwealth Trust Co. v. Smith*, 266 U.S. 152 (1924); *Coiron v. Millaudon*, 60 U.S. (19 How.) 113 (1856); *Dandridge v. Washington*, 27 U.S. (2 Pet.) 370 (1829); *Marshall v. Beverly*, 18 U.S. (5 Wheat.) 313 (1820).

involved in the action.¹² The second new addition, called the "spurious" class action, was not a class suit at all, but merely a procedure for the permissive joinder of all plaintiffs similarly situated when a common question of law or fact existed and a common relief was sought.¹³ The justification for the spurious class action was its convenience in litigating numerous individual claims in one action. It was actually an invitation to all persons similarly situated to join the action and litigate their separate claims as one. However, the decision in a spurious class action had no binding effect on the members of the class who had not become parties to the action.¹⁴

By 1965 it had become apparent that Rule 23 was vague and unworkable.¹⁵ The problems stemmed from the obscure categories—labeled true, hybrid, and spurious—and the difficulties which many courts had in distinguishing them.¹⁶ Consequently, the class action procedural rule was completely rewritten. Amended Rule 23 establishes prerequisites for the maintenance of all class actions,¹⁷ eliminates the ambiguous categories and replaces them with readily distinguishable types of class actions,¹⁸ provides that any such action litigated to a final decision will be res judicata to all members of the class whether or not the judgment is favorable to the class,¹⁹ and establishes standard procedures for the fair conduct of the actions.²⁰

The decision in *Zahn v. International Paper Co.* is not an interpretation of Rule 23, but an interpretation of the jurisdictional amount requirement under the diversity statute. The traditional judicial interpretation of the jurisdictional amount requirement has been that the separate and distinct claims of two or more plaintiffs could not be aggregated in order to satisfy the jurisdictional amount requirement,²¹ except in cases in which a single

¹²MOORE, *supra* note 6, ¶ 23.09, at 2571.

¹³*Id.* ¶ 23.10[1] at 2601.

¹⁴Hansbury v. Lee, 311 U.S. 32 (1940). *See also* Pennoyer v. Neff, 95 U.S. 714 (1877).

¹⁵Advisory Committee's Note, 39 F.R.D. 69 (1966).

¹⁶*Id.* For a discussion of these problems, see *Developments in the Law: Multi-party Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 931 (1958).

¹⁷FED. R. CIV. P. 23(a).

¹⁸*Id.* 23(b).

¹⁹*Id.* 23(c)(3).

²⁰*Id.* 23(c), (d), (e).

²¹Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911). *See also* Pinel v. Pinel, 240 U.S. 594 (1916).

plaintiff seeks to aggregate two or more of his own claims against a single defendant or where two or more plaintiffs have united to enforce a single title or right in which they have a common and undivided interest.²² However, prior to the holding in *Zahn*, once the class action proceedings had been initiated by representatives, each of whom claimed ten thousand dollars in damages, the other members of the class, regardless of whether they claimed the requisite amount, could join in the class action through failure to opt out of the proceeding, as required by the Rule.²³ Since the *Zahn* decision, all members of the class are required to claim the jurisdictional amount or be dismissed from the class action.

The Court based its decision on its recent holding, in *Snyder v. Harris*,²⁴ that individual claims of multiple plaintiffs could not be aggregated to meet the jurisdictional amount requirement. *Snyder*, however, is factually distinguishable from *Zahn*. In *Snyder*, none of the plaintiffs could satisfy the ten thousand dollar jurisdictional amount requirement,²⁵ whereas, in *Zahn*, each of the four named plaintiffs did so. Unfortunately, Justice Black, writing for the majority in *Snyder*, quoted dictum from another case that "it is essential that the demand of each be the requisite jurisdictional amount."²⁶ This language was adopted by the majority in *Zahn* as authority for the Court's decision.²⁷

The dissent indicated that the major controversy in *Zahn* did not involve judicial interpretation of the jurisdictional amount statute or aggregation of claims, but rather the concept of ancillary jurisdiction in the federal courts.²⁸ Ancillary jurisdiction is a procedural concept whereby a federal court acquires jurisdiction of a case in its entirety and, "as an incident to disposition of a matter properly before it, possesses jurisdiction to decide other matters

²²*Woodside v. Beckham*, 216 U.S. 117 (1910); *Waite v. Santa Cruz*, 184 U.S. 302, 328-29 (1902); *Wheless v. St. Louis*, 180 U.S. 379, 382 (1901).

²³*Cf. Hatridge v. Aetna Cas. & Sur. Co.*, 415 F.2d 809 (8th Cir. 1969); *Stone v. Stone*, 405 F.2d 94, 96-99 (4th Cir. 1968); *Jacobson v. Atlantic City Hosp.*, 392 F.2d 149 (3d Cir. 1968).

²⁴394 U.S. 332 (1969).

²⁵*Id.* at 333.

²⁶*Id.* at 336. Justice Black was quoting from *Troy Bank v. Whitehead & Co.*, 222 U.S. 39, 40 (1911). This case is distinguishable in that neither of the plaintiffs could meet the requisite jurisdictional amount.

²⁷Additionally, the Court relied on the case of *Clark v. Paul Grey, Inc.*, 306 U.S. 583 (1939). This case, too, can be distinguished from *Zahn* in that the damages had to be aggregated in order to reach the requisite jurisdictional amount.

²⁸94 S. Ct. at 514.

raised by the case of which it could not take cognizance were they independently presented."²⁹ An ancillary claim may be heard without regard to the citizenship of the parties, the amount in controversy, or any other factor ordinarily determinative of a federal court's jurisdiction. In *United Mine Workers v. Gibbs*,³⁰ the Court considered the doctrine of pendent jurisdiction, often regarded as closely related to ancillary jurisdiction.³¹ As stated in *Gibbs*, pendent jurisdiction, that is, the hearing of a claim without independent jurisdictional grounds when it is joined with a claim for which jurisdiction is proper, exists whenever two claims arise from "a common nucleus of operative fact" and are such that the plaintiff would normally be "expected to try them all in one judicial proceeding."³² Pendent jurisdiction is discretionary with the court; considerations of "judicial economy, convenience and fairness to litigants" control its use.³³

Under the *Zahn* holding, when those plaintiffs who cannot meet the ten thousand dollar jurisdictional requirement are dismissed from the suit, they will have no alternative, if they wish to maintain their suit, but to file in state court. This presents a situation whereby two judicial systems, state and federal, are called upon to decide the same issues on the same facts—the exact situation which the doctrines of ancillary and pendent jurisdiction were created to avoid.

In addition to frustrating the stated purpose of the Federal Rules of Civil Procedure—"to secure the just, speedy, and inexpensive determination of every action"—³⁴ the *Zahn* decision will force many 23(b)(3) class actions from the federal courts altogether. In the *Zahn* case, the district judge not only dismissed the members of the class without ten thousand dollars in damages but also the entire suit as well. The court reasoned that a class consisting of all land owners having ten thousand dollars or more in damages would not be practicable because each member of the class seeking to assert this claim would have to appear and at least plead, and perhaps prove, that he has a good faith claim to that amount. This would eliminate any advantage of the class action over other

²⁹C. WRIGHT, *FEDERAL COURTS* § 9, at 19 (2d ed. 1970).

³⁰383 U.S. 715 (1966).

³¹See WRIGHT, *supra* note 29, § 20, at 65.

³²383 U.S. at 725.

³³*Id.* at 726.

³⁴FED. R. CIV. P. 1.

methods for the fair and efficient adjudication of the controversy, as required by Rule 23(b)(3).³⁵ If the same position is taken by other district courts, the 23(b)(3) class action could no longer be brought in federal courts under the diversity statute.

This aspect of the *Zahn* decision will cause hardships to many litigants. First, there may be no other method of obtaining service of process and jurisdiction over all parties involved in the action other than through the federal courts. Second, the rules of civil procedure of many states do not provide for class actions.³⁶ Finally, in many states; litigants unable to use the class action device and, therefore, forced to sue individually, might be precluded from bringing suit because of the prohibitive costs which may be involved.³⁷

The *Zahn* decision may have a similar effect on class actions which seek the federal courts through the general federal question statute,³⁸ because this, too, has a ten thousand dollar amount re-

³⁵The district court stated:

[A] class defined as all lakefront landowners and lessees . . . having \$10,000 in controversy would not be feasible. The class would have to be further defined. . . . A determination before trial of the landowners actually encompassed within this class would require the unnamed class members to appear and at least plead, and perhaps prove facts substantiating, an amount in controversy. This would eliminate any advantage of a class action and would therefore not be properly maintainable because class treatment would not be "superior to other available methods for the fair and efficient adjudication of the controversy," as required by Rule 23 (b)(3).

53 F.R.D. at 433.

³⁶Six states have no provision for class actions: Delaware, Georgia, Hawaii, Mississippi, New Hampshire, and Virginia. Fifteen other states have very limited procedures based upon the old equity rule regarding class actions: ALA. CODE tit. 7, § 128 (1958); ARK. STAT. ANN. § 27-809 (1962 Replacement Volume); CAL. CIV. PRO. CODE § 382 (Deering 1972); CONN. GEN. STAT. ANN. § 52-105 (1958); FLA. R. CIV. P. 1.220; ILL. ANN. STAT. ch. 110, § 23-24 (Smith-Hurd 1968); MD. R. CIV. P. 209; MASS. ANN. LAWS ch. 231, § 4A (1956); NEB. REV. STAT. § 25-319 (1964); N.Y. CIV. PRAC. LAW § 1005 (McKinney 1963); OKLA. STAT. ANN. tit. 12, § 233 (1960); ORE. REV. STAT. § 13.170 (1971); PA. R. CIV. P. 2230; S.C. CODE ANN. § 10-205 (1962); WIS. STAT. ANN. § 260.12 (1957).

³⁷The Second Circuit Court of Appeals stated recently that one of the most important functions of the class action is that it "provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968), cert. granted, 414 U.S. 908 (1973).

³⁸28 U.S.C. § 1331: "Federal question—Amount in controversy—Costs.—(a) The district courts shall have original jurisdiction of all civil actions wherein the

quirement. Thus, unless methods are found to circumvent the *Zahn* decision, it will greatly impair the use of the 23(b)(3) class action.

Many statutes give jurisdiction to federal courts without regard to jurisdictional amount.³⁹ Most of these jurisdictional statutes deal with specialized areas of the law such as admiralty,⁴⁰ bankruptcy,⁴¹ and postal matters.⁴² However, two such statutes may be useful in circumventing the *Zahn* decision. The first of these provides simply that "the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."⁴³ This statute covers a multitude of controversies without regard to the amount in conflict or diversity of citizenship.⁴⁴

A second jurisdictional statute can be used in some limited actions. Jurisdiction is given to the federal courts without regard to amount in controversy or diversity of citizenship for those actions brought under the Civil Rights Act of 1871.⁴⁵ This Act gives individuals a right of action for damages against any person who "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory," deprives one of any "rights, privileges, or immunities secured by the Constitution and laws" of the United States.⁴⁶ Despite the broad language of this statute, the courts have consistently held that state licensing activities do not thereby bring the actions of private individuals or corporations under color of state statute.⁴⁷ Nevertheless, the Civil Rights Act

matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

³⁹*E.g.*, 28 U.S.C. §§ 1333-62 (1971).

⁴⁰*Id.* § 1333.

⁴¹*Id.* § 1334.

⁴²*Id.* § 1339.

⁴³*Id.* § 1337.

⁴⁴Professor Wright believes that section 1337 grants jurisdiction to the district courts whenever the suit involves an act whose constitutional basis is the commerce clause. WRIGHT, *supra* note 29, § 32, at 109.

⁴⁵28 U.S.C. § 1343 (1971).

⁴⁶42 U.S.C. § 1983 (1971).

⁴⁷*See, e.g.*, *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). A recent federal court decision in West Virginia held that the plaintiff's claim that the State's air pollution abatement program amounted to nothing more than a State license for the corporation to pollute was not cognizable under the Civil Rights Act of 1871, and, hence, subject matter jurisdiction could not be invoked under the civil rights juris-

may permit class actions in federal courts when the pleadings can be fit into the requirements of the statute.

A final alternative to the difficulties presented by the *Zahn* decision is simply to file the class action in state court; however, some problems also arise with this approach. Only seventeen states have procedural rules for class actions modeled on the amended federal rule.⁴⁸ Twelve states, including West Virginia, have class action procedures based upon the original federal rule with the nebulous distinctions between true, hybrid, and spurious class suits.⁴⁹ The remaining twenty-one states have either no procedure for class actions or a very limited provision based on the old Equity Rule.⁵⁰

The best solution to the *Zahn* decision, as Professor Wright suggests,⁵¹ would be to amend the diversity and general federal question statutes to provide that only one plaintiff need have the ten thousand dollar jurisdictional amount to bring a class action suit. An amendment expanding the jurisdiction and workload of the federal courts, however, is extremely unlikely at this time. Thus, it seems that the solution to the problems brought about by *Zahn* will have to be worked out on the state level. Each state not operating on class action procedures based on the amended federal rule should give serious consideration to adopting the federal procedure. If each state were to have a class action procedure based on the amended federal rule, a just, speedy, and inexpensive procedure would be available in many cases where numerous litigants are involved.

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dictional statute. *Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061 (N.D.W. Va. 1973).

⁴⁸ARIZ. R. CIV. P. 23; COLO. R. CIV. P. 23; KAN. STAT. ANN. § 60-223 (Cum. Supp. 1973); KY. R. CIV. P. 23; IND. R. CIV. P. 23; MINN. R. CIV. P. 23; MO. R. CIV. P. 52.08; MONT. R. CIV. P. 23; NEV. R. CIV. P. 23; N.D.R. CIV. P. 23; OHIO R. CIV. P. 23; S.D. COMPILED LAWS ANN. § 15-6-23 (1967); TENN. R. CIV. P. 23; UTAH R. CIV. P. 23; VT. R. CIV. P. 23; WASH. R. CIV. P. 23; WYO. R. CIV. P. 23.

⁴⁹ALASKA R. CIV. P. 23; IDAHO R. CIV. P. 23; IOWA R. CIV. P. 42; LA. CODE CIV. PRO. ANN. art. 591-97 (West 1960); ME. R. CIV. P. 23; MICH. GEN. CT. R. 208; N.J. CIV. PRAC. R. 4:36-1; N.M. STAT. ANN. § 21-1-1(23); N.C.R. CIV. P. 23; R.I.R. CIV. P. 23; TEX. R. CIV. P. 42; W. VA. R. CIV. P. 23.

⁵⁰See note 36 *supra*.

⁵¹WRIGHT, *supra* note 25, § 32, at 110.

